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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. ~~1028~~ 163.

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

PETITION FOR REHEARING.

JOHN WATTAWA,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 163

~~No. 1023.~~

JOHN A. DUNSCOMBE,
Appellant,

vs.

HAROLD C. SAYLE, Administrator of the Estate of Walter D. Sayle, Deceased,
Appellee.

PETITION FOR REHEARING.

The appellant is [redacted] aggrieved with the decision of this court dismissing his appeal on October 10th, 1960, and feels he either failed to make the errors complained of sufficiently clear or this court overlooked the following questions and therefore respectfully prays the court grant him a rehearing and vacate said judgment, grant the appellant a rehearing and pass on the questions raised, on the following several and separate grounds.

1. That the motion to dismiss the appeal in no way complied with the rules and should not have been granted.

2. That the contract of the appellant was impaired and destroyed and his federal constitutional rights under Article I, Section 10, violated by the procedure in the Florida Circuit Court.

3. That the appellant was deprived of his property and the right to enforce his contract without notice or due process of law and his property taken and given to the appellee without compensation in violation of his constitutional rights under the Fifth Amendment to the Federal Constitution, by the method of procedure of the Florida Circuit Court.

ARGUMENT.

1. That the motion to dismiss in no way complied with the rules and should not have been granted.

In support thereof the appellant cites the law and cases cited in his motion and brief objecting to said motion to dismiss the appeal as it failed to provide due process of law.

There were no reasons or grounds in the motion of the appellee as to why said appeal should be dismissed and in the absence of such grounds the appellant can't point out which of the unstated grounds were not applicable or invalid nor could the appellant rebut such unstated grounds and show why the appeal should not be dismissed.

2. That the contract of the appellant with the City of Stuart was impaired and destroyed and his federal constitutional rights under Article I, Sec. 10, violated by the procedure followed in the State Circuit Court.

Best v. *Turner*, 67 F.2d 786, 90 A.L.R. 1293, 2nd headnote.

"As the rig ts of the parties are dependent upon the Constitution and laws of Texas for a course of rule of property we accept the law of the state as construed by its highest court citing Warburton v. White. 176 U.S. 484; Chicago v. Risty, 276 U.S. 567, 48 S. Ct. 396."

State v. *Ivey*, 3 So.2d 345:

"The rights of the purchaser of a tax certificate are determined by the law in effect at the time of its acquisition."

State v. *Draughton*, 173 So. 352, 111 A.L.R. 345:

"A tax certificate is a contract between the authority that issues it and the purchaser and that right is protected by the constitutional guarantee of its impairment."

That unless the taxes are redeemed before the sale the holder is entitled to a tax deed.

12 Am. Jur. 67, Sec. 431, and cases cited as to what impairs a contract that the appellant had purchased from the City of Stuart for a valuable consideration, a final decree of tax foreclosure on the land in question after the court had determined that the taxes were valid and the amount due or the amount of money the land was liable for and was then substituted in the place of the City to enforce the final decree of foreclosure.

In *Fidelity Life Assoc.* v. *Martin County BPI*, 81 Fla. 2d 586, the school board had issued bonds to cover the cost to repair schools after a hurricane and the said bonds had been validated and sold after the validating decree. That later another court held similar bonds invalid and thereupon the School Board repudiated the validated bonds. While the trial court upheld that defense the Circuit Court of Appeals reversed and held:

"That if when the bonds were sold their validity had been determined by court decree their validity could not be affected by a later decision by some other court and cited Gulphe v. Dubuque, 1 Wall. 175; Douglass County v. Pike, 101 U.S. 677; Concordia Ins. Co. v. School Dist., 282 U.S. 545."

Beloit v. *Morgan*, 7 Wall. 206, 12th headnote:

"The judgment at law established conclusively the original validity of the securities described in the complaint and the liability of the town to pay them."

Los Angeles v. *Los Angeles Water Co.*, 177 U.S. 558:

"A contract authorized by the existing state constitution as then construed by the highest court of the State cannot be affected by a subsequent change of decision of that court."

In the instant case the final decree in the suit of the City conclusively established the validity of the taxes and the tax certificates based thereon and the amount the land described therein was liable for and that judgment is *res adjudicata* and has never been appealed or modified.

As stated in *State* v. *Draughton*, 173 So. 352, the purchaser of such certificates has a contract with the authority who issues it, that unless the taxes are paid or redeemed before the sale the tax certificate holder is entitled to a deed.

31 Fla. Jur. 265; *Coombes* v. *Wheeler*, 179 So. 785:

"In proceedings to foreclose municipal tax certificates the court has the power to fix the terms and conditions of the sale."

Nassau Realty Co. v. *Jacksonville*, 198 So. 581:

"Where the final decree of foreclosure of municipal tax certificates was entered in the Chancery Order

Book the fact that it was not recorded in the judgment and lien records does not render invalid subsequent proceedings for the sale of the land where the owner *failed to redeem.*"

Adams v. *Adams*, 180 So. 519:

"And such a final decree cannot be set aside except by appeal and is not subject to collateral attack."

3. That the appellant was deprived of his property and the right to enforce the final decree without notice or due process of law and his property taken and given to the appellee without compensation in violation of his constitutional rights under the Fifth Amendment by the method of procedure in the Florida Circuit Court.

The vital question on this appeal is whether the appellant can be deprived of his property right in the assigned final decree and right to enforce it without due process of law and in violation of his rights guaranteed under the Fifth Amendment and his property given to another without compensation.

Sec. 702.02 of Florida Statutes provides that the court can adopt the method of procedure to sell foreclosed property and direct the Clerk to advertise and sell said property after due advertisement and selling to the highest bidder. That upon such sale the Clerk issues the certificate of sale to the purchaser and then any interested party has 10 days within which to file objections to provide due process of law and avoid having the court confirm the sale. The Clerk proceeded to follow this order, advertised the land for sale, had the affidavit of publication at the sale and sold the land to the appellant and issued and delivered him the certificate of sale. When the ten day period had expired and no objections to the sale were filed the appellant asked for his certificate of title

and the Clerk then told him that the Court *had orally enjoined her* from issuing the certificate of title.

Florida Rule of Procedure 3.19 and which was adopted from the Federal Rule 65 forbids injunctions to issue without notice.

Florida Rule of Ethics for Judges IV—16:

> "Forbids ex parte applications for injunctions where the order may work a detriment to absent parties and only when the need of quick action is shown."

Rule 1.4 of procedure which was adopted from Federal Rule 5 requires that all pleadings and orders be filed in the court and cause.

But no motion or petition or order granting the injunction was ever filed to enjoin the Clerk from issuing the certificate of title or any notice of any such application and therefore the record shows the appellant was deprived of due process of law and by such proceeding his property was given to the appellee without compensation and appellant was deprived of his property right in the final decree that he had purchased and his right to enforce the same.

Sec. 702.02 provided the appellee with ample remedy if there were anything wrong with the sale as all he had to do was to file his objections, if any he had, and show why the sale was invalid but as he deducted these taxes from the purchase price he was estopped to deny their validity on any grounds.

Key West Wharf v. *Porter*, 58 So. 599, 1914A, Anno. Case 173:

> "One who purchases property subject to a lien and deducts the amount thereof from the purchase

price is estopped to question the validity of lien on any grounds."

12 Am. Jur. 247, Sec. 573, cites a large number of cases where this court has held such method of procedure does not afford due process of law.

Ochoa v. *Hernandez*, 230 U.S. 139, S. Ct. 33, page 1033:

> "Due process forbids taking one man's property and giving it to another, contrary to settled usages and *modes of procedure* and *without notice or opportunity of hearing.*"

Kenohah v. *Shaffer Oil Refining*, 38 F.2d 665, affirmed 48 F.2d 509:

> "One acquiring rights by administrative or judicial proceedings cannot be deprived of them *without notice and an opportunity to be heard.*"

There is no law or authority for the issuance of oral injunctions on *ex parte* applications without any notice nor did equity have any jurisdiction even if a motion or petition had been filed as the plain statutory remedy was ample by filing objections to the sale if there had been any grounds therefor.

But the effect of this unlawful method of procedure was to impair the judgment and render its enforcement impossible without due process of law and in fact give to the appellee the property of the appellant. But as the appellee could gain no benefit by such method of procedure and equity would consider that done which should have been done, this court should vacate said oral injunction and remand the case to the trial court with order

to the Clerk of said Court to issue and deliver the certificate of title to the appellant.

Respectfully submitted,

JOHN WATTAWA,
1317 F Street, N. W.,
Washington 4, D. C.,
Attorney for Appellant.

John Wattawa certifies that the foregoing petition for rehearing is filed in good faith and not for delay and that he mailed a copy thereof to Mr. C. R. Burns, 224 Worth Avenue, Palm Beach, Florida, on October ....., 1960.

.....,
JOHN WATTAWA.